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Nos. 07-1428 & 08-328

IN THE

Supreme Court of the United States

FRANK RICCI, *ET AL.*

Petitioners,

V.

JOHN DeSTEFANO, *ET AL.*

Respondents.

On Writ of Certiorari to the United States Court of Appeals For The Second Circuit

AMICUS BRIEF OF THE OPPORTUNITY AGENDA IN SUPPORT OF RESPONDENTS

ANKUR J. GOEL
Counsel of Record
KELLY M. FALLS
AMY H. GRANGER
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 756-8000

ALAN JENKINS
JUHU THUKRAL
KEVIN S. HSU
THE OPPORTUNITY AGENDA
568 Broadway, Suite 302
New York, NY 10012
(212) 334-5977

Counsel for Amicus Curiae

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INTERESTS OF AMICUS[1]

The Opportunity Agenda, a project of the Tides Center, is a communications, research, and advocacy organization with the mission of building the national will to expand opportunity in America. Among The Opportunity Agenda's core objectives is the elimination of barriers to equal employment opportunity irrespective of race, gender, nationality, socioeconomic status, or disability. The organization's recent activities have included research regarding unequal access to employment, credit, and other economic opportunities across the nation. The subject matter of this case is therefore of keen interest to the organization.

The Opportunity Agenda's parent organization, the Tides Center, is a not-for-profit, 26 U.S.C. § 501(c)(3) California corporation that provides core management and financial services as a fiscal sponsor to approximately 350 nonprofit program initiatives. The Tides Center actively promotes change toward the principles of social justice, broadly shared economic opportunity, fundamental respect for individual rights, the vitality of communities, and a celebration of diversity.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief in the form of blanket consent letters filed with the Clerk.

SUMMARY OF ARGUMENT

Because much of this case has been couched in terms of "avoiding liability" or "good faith compliance" with the law, Pet. Br. 28, Resp. Br. 45, it is important to remember what the case is fundamentally about: the ability of employers, and particularly state and local governments proactively to ensure that their workforce selection procedures provide equal opportunity and are free from discrimination.

1. A. When an employer encounters evidence "on the ground" that its procedures may be discriminatory, it is faced with a choice: ignore the evidence and adopt the results of a possibly discriminatory process, or attend to that evidence by reexamining the process, exploring viable alternatives, and suspending a pending decision if necessary to avoid a biased outcome. The latter course is dictated not only by Title VII, but also by the responsibility, rooted in the Equal Protection Clause, to ensure equal opportunity for all.

Adopting Petitioners' interpretation of the law would be contrary to this Court's precedent, and would hobble a wide range of established and effective equal opportunity measures. For example, if a school district were to propose that new schools be sited in a particular location, and subsequently determine that the site would result in unnecessary racial concentration, this Court's case law would allow the school district to decline to go forward with the site plan while it considered other alternatives.

See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S.Ct. 2738 (2007).

Similarly, if a city commission consistently awards public contracts only to white contractors despite clear evidence that many equally qualified minority contractors exist and have bid for city contracts, a City Council that suspects the commissioners are engaging in *intentional* discrimination may suspend all contract approvals until a full investigation can be completed, and alternative procedures explored. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989).

B. The same principles clearly apply in the employment context. It is especially important now, in the 21st century, to assure that the law allows employers voluntarily to pause their hiring and promotion procedures, and look for better alternatives.

Our nation has made great progress in reducing and eliminating discrimination, but racial disparities remain pervasive, and discrimination has not been eradicated. Discrimination today is far less likely to announce itself overtly, but instances of covert, intentional discrimination remain and are routinely documented. Moreover, contemporary social science research has identified the extent to which discrimination is embedded within social institutions, and has further identified the unintentional, implicit biases that individuals hold as a part of human nature.

Covert bias, institutionalized bias, and implicit (unintentional) bias coalesce to cause the kinds of disparities that remain pervasive throughout American society. Evidence of these contemporary forms of unlawful discrimination is often found initially in the disparate racial outcomes themselves, and its more complex nature is especially likely to require investigation and assessment of procedures.

C. Consensus exists across governments that proactive responses to statistical evidence of discrimination are lawful and integral to protecting equal opportunity. That consensus is reflected in the international Convention on the Elimination of All Forms of Racial Discrimination, a treaty to which the United States and 173 of the world's other governments have agreed. And it is evident in the international embrace of the *Griggs* disparate impact standard. *See D.H. and Others v. Czech Republic*, 57325/00 Eur. Ct. H.R. (Nov. 13, 2007).

2. A. Importantly, although the Title VII doctrine is routinely referred to as "disparate impact," the disparate racial outcomes and impacts are not themselves unlawful. Rather, the disparate outcomes are "markers" an employer may properly interpret as signaling a need to scrutinize its selection procedures to assure that they are not unlawful, that they meets legitimate business needs, and that an effective, but less discriminatory alternative does not exist.

Contrary to petitioners' contention, Pet. Br. 44, reexamining and abandoning planned decisions

based on numerical evidence of discrimination and the prospect of less discriminatory alternatives is fully consistent with Title VII. Indeed, doing so fulfills Congress's preference for voluntary compliance with that statute, and this Court's emphasis on Title VII's role in eliminating "built-in headwinds" against advancement. *Griggs v. Duke Power*, 401 U.S. 424, 432 (1971).

Attending to these discriminatory outcomes does not warrant strict scrutiny under the Equal Protection Clause. Whereas strict scrutiny *is* triggered by certain uses of racial classifications to influence the ultimate racial *composition* of a workforce, student body, or field of contractors, the focus of Title VII and of the governmental decision in this case was on the fairness and legality of the *selection procedure*, irrespective of the racial distribution that it ultimately produces, and without assigning particular individual candidates to favored or disfavored groups.

B. Of course, where compliance with Title VII operates as a pretext for racial animus, both the enforcement mechanisms of Title VII and, in the case of public employers, the Equal Protection Clause act to check discriminatory conduct.

For all of these reasons, this Court should affirm the decision below.

ARGUMENT

I. INVESTIGATING AND RESPONDING TO DISPARATE OUTCOMES TO IDENTIFY POTENTIALLY DISCRIMINATORY PRACTICES IS ESSENTIAL TO ENSURING EQUAL OPPORTUNITY AND CONSISTENT WITH TITLE VII

Since the Civil Rights Act of 1964 was enacted, our nation has made remarkable progress in promoting equal opportunity and freedom from discrimination. Official segregation has been abolished, overt bias has receded, and the country has elected its first African-American President.

Yet abundant research and experience make clear that significant work remains, and that state and municipal governments have a crucial role to play in ensuring equal opportunity in employment, housing, and other sectors. *Cf. Bartlett v. Strickland*, No. 07-689, 556 U.S. ___, slip. op. at 21 (Mar. 9, 2009) (opinion of Kennedy, J.) ("[R]acial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions."). Fulfilling that role, moreover, necessitates that governments have the authority, and often the obligation, to investigate and root out discriminatory processes and mechanisms, as well as to identify and substitute less discriminatory alternatives. Doing so is part and parcel of, and

fully consistent with, Title VII strictures on governmental employers.

This Court's cases recognize the need for public employers to investigate and avoid potentially discriminatory practices by examining disparate outcomes to determine if they are unlawful, or if better alternatives are available. Doing so is particularly important to addressing the kind of covert, institutional, and implicit biases that are dominant today.

A. This Court's Cases Recognize the Government's Responsibility to Investigate and Respond to Evidence of Discriminatory Procedures

This Court has long held that governmental employers have the authority, and often the obligation, to investigate and respond when disparate outcomes suggest that discriminatory procedures may exist. It is crucial for employers to do so to address intentional discrimination under the Constitution and federal statutes, as well as processes with unintentional and unnecessary discriminatory effects in violation of Title VII's disparate impact standards.

1. Since at least 1886, in *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886), the Court has recognized that the Fourteenth Amendment requires examining decisions that have a discriminatory effect to determine whether there is an underlying discriminatory motive, in violation of the Equal

Protection Clause. Facially neutral laws or policies can be "void by reason of [their] administration, operating unequally, so as to punish in [one] what is permitted to others as lawful." *Id.* at 369. Statistically unequal outcomes in the "actual operation" of decisionmaking criteria, the Court further found, *id.* at 373, are highly relevant—though not necessarily determinative—in identifying unlawful discrimination.

A long line of subsequent cases has noted that a facially neutral law can be applied in a discriminatory manner, and that racially disparate outcomes are compelling warning signs of discriminatory intent, warranting governmental attention. *See, e.g.*, *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of [a] state action."); *Washington v. Davis*, 426 U.S. 229, 241 (1976) ("[A] law's disproportionate impact is []relevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race."); *Batson v. Kentucky*, 476 U.S. 79, 93 (1986) ("[P]roof of discriminatory impact may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." (internal quotation marks omitted)).

Petitioners' contention that it is unlawful to halt a public hiring process in order to explore the cause of a disparate outcome and investigate the

existence of alternatives, Pet. Br. 54, 59, flies in the face of this established jurisprudence. Under petitioners' reading, a public employer would violate Title VII by responding to statistical evidence of discrimination in its own ranks as stark as the "inexorable zero" African-American drivers identified by the Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977).

As Justice Kennedy recognized in his concurring opinion in *Croson*, "the State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself." 488 U.S. at 518. Nothing in the text or history of Title VII suggests an intent to disable state and municipal employers from fulfilling that role. Even absent the prospect of adverse litigation, municipalities have the power and often the duty to investigate and suspend decisionmaking processes in light of starkly discriminatory outcomes or other strong indicia of discrimination. It defies reason to suggest, as petitioners do, that Title VII was intended to thwart that governmental role.

2. To the contrary, Title VII requires employers to identify and respond to disparate outcomes, both to root out intentional discrimination, and to eliminate procedures that "operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Griggs*, 401 U.S. at 432. If the congressional selection of "[c]ooperation and voluntary compliance

. . . as the preferred means for achieving" Title VII's goals means anything, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974), employers must have the latitude to investigate and respond to significantly disparate outcomes to determine whether they are the result of unlawful selection processes.

The Court has repeatedly recognized the importance of attending to significant statistical disparities in identifying a pattern or practice of intentional discrimination under Title VII. *See, e.g.*, *Teamsters*, 431 U.S. at 339 ("Statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue"; "Statistics are equally competent in proving employment discrimination." *citing Mayor of Phil. v. Educ. Equal. League*, 415 U.S. 605, 620 (1974) & *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973)); *see also Croson*, 488 U.S. at 501 (gross statistical disparities may constitute prima facie proof of a pattern or practice of discrimination).

Moreover, Title VII's disparate impact provision, which are the basis for the voluntary compliance efforts at issue in this case focuses on scrutinizing employment practices that have unwarranted disparate impacts.

Title VII's disparate impact provision forbids an employer from utilizing "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex or national origin" unless the employer can "demonstrate that the challenged practice is job related for the position in question

and consistent with business necessity." 42 U.S.C. § 2000-e2(k)(1)(A)(i). Even under those circumstances, the statute is violated if there exists an "alternative employment practice" with a lesser discriminatory effect, which the employer refuses to adopt. 42 U.S.C. § 2000-e2(k)(1)(A)(ii) & (C).

Petitioners are correct in stating that disparate impact and outcomes, without more, do not violate Title VII because it is well-established that Title VII does not provide for or turn on the ultimate racial outcomes. Pet. Br. 50; *see also Connecticut v. Teal*, 457 U.S. 440 (1982). But petitioners miss the essence of the Title VII disparate impact provision: disparate outcomes are a "marker," or "red flag" that something may be amiss, and properly trigger examination of the selection criteria. The legal term "disparate impact" is a shorthand to describe the circumstances that give rise to a need to scrutinize whether a particular employment practice unnecessarily and inappropriately deprives job applicants of equal opportunities.

Responsible voluntary compliance with Title VII requires employers to invest in reliable selection systems, but also to respond to conditions "on the ground." Especially where, as here, a test or other criterion is being used for the first time, an employer must be responsive to emerging evidence suggesting: (1) that the instrument has a discriminatory effect; (2) that it is not job-related for the position in question; (3) that it is not consistent with business necessity; and/or (4) that less discriminatory alternatives exist. At any of those junctures, a responsible employer should suspend, reexamine,

and possibly abandon its procedures—not simply to avoid liability, but to ensure that it is providing truly equal employment opportunity.

B. Attending to Disparate Outcomes is Especially Important in Addressing Contemporary Discrimination

As described above, adopting petitioners' interpretation of the law would contravene this Court's Title VII and Equal Protection precedents, and hobble a wide range of established and effective equal opportunity measures. These policies, and the authority to pursue them voluntarily, moreover, are especially important in the 21st century, when unlawful discrimination persists, but is most likely to be covert, institutional, or implicit in nature.

A large body of research and experience reveals that despite the progress we have made as a nation, racial bias and discrimination persist in employment and in other sectors. Importantly, however, these practices frequently take more sophisticated and less visible forms than at the time that Title VII was first enacted. While instances of overt and blatant racial discrimination still occur,[2]

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[2] Recent court cases reveal instances of postings of "no minorities" in on-line advertisements, *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668 (7th Cir. 2008) (postings for housing on Craigslist), and instances in which individuals were harassed with racial and religious epithets and subjected to "myriad and outrageous" discriminatory

discrimination in the 21st Century is more likely to be covert, implicit, or embedded in institutional structures.

These more subtle forms of intentional and unintentional bias nonetheless have a real and persistent effect, and frequently come to light in the first instance only by examining and attending to discriminatory effects. Because Congress proscribed "not only overt discrimination but also practices that are fair in form, but discriminatory in operation," *Teamsters*, 431 U.S. at 349 (quoting *Griggs*, 401 U.S. at 431), and sought "to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race," *Alexander*, 415 U.S. at 44, responding to racially disparate outcomes remains crucial to protecting employees from discrimination. Further, because "[c]ooperation and voluntary compliance were selected as the preferred means for achieving this goal," *id.*, public and private employers must have the latitude to investigate and respond to evidence of discriminatory outcomes.

Although modern social science research documents a substantial decrease in overt, self-reported racial animosity over the last several

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treatment, *Azimi v. Jordan's Meats, Inc.*, 456 F. 3rd 228, 232-33 (1st Cir. 2006). *See also Roberts v. Texaco*, 979 F. Supp. 185 (S.D.N.Y. 1997) (referencing taped conversations of senior corporate officials with racial bias).

decades,[3] there is overwhelming evidence of continued racial bias in employment and related contexts. Studies show that racial biases affect employment opportunity and hiring practices, as well as opportunity in housing, health care, lending, and a variety of other important aspects of everyday life. While not all of these biases are ultimately actionable under our civil rights laws, large categories do fall within their purview and, at least, warrant investigation and assessment by government actors. Moreover, as in this case, their presence makes it difficult for public and private employers to predict, ex-ante, the likelihood of disparate impact, thus highlighting the need for a flexible legal framework within which to react to evidence of bias.[4]

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[3] *See , e.g.*, PEW RESEARCH CENTER, OPTIMISM ABOUT BLACK PROGRESS DECLINES 1 (Nov. 13, 2007) (survey shows "that black and white Americans express very little overt racial animosity"); Devah Pager & Lincoln Quillian, *Walking the Talk? What Employers Say Versus What They Do*, 70 AM. SOCIOLOGICAL REV. 355 (June 2005); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1506 n.76 (2005); PREJUDICE, DISCRIMINATION & RACISM 3-10 (John F. Dovidio & Samuel L. Gaertner, eds., Academic Press, Inc.) (1986).

[4] The Brief of Industrial-Organizational Psychologists as *Amici Curiae* in Support of Respondents, filed in this case, addresses the specific context of test-based selection. This brief, therefore, focuses on other manifestations of bias in selection processes.

1. *Covert bias.* While overt discrimination is on the wane when compared with past decades, it has in some cases been replaced by covert (but intentional) discrimination which, when spread out across multiple actors in an institution, is exceedingly difficult to detect. As this Court has long recognized, covert racial animus that results in discriminatory outcomes is unlawful, yet often difficult to identify, requiring reliance on legal inference. *See, e.g.*, *Miller-El v. Dretke*, 545 U.S. 231, 246 (2005) (failure to provide reasonable explanation for voir dire dismissals suggests pretext for discrimination); *Batson*, 476 U.S. at 91-92 (inference of discrimination raised by removal of qualified black jurors); *Arlington Heights*, 429 U.S. at 266 (court must look to circumstantial evidence of discriminatory intent); *McDonnell Douglas*, 411 U.S. at 805 (statistical evidence may demonstrate pattern of discriminatory practice).

One recent study documented the dramatic effect that covert discrimination can have on African Americans and Hispanics in the employment context. Devah Pager & Bruce Western, RACE AT WORK, REALITIES OF RACE AND CRIMINAL RECORD IN THE NYC JOB MARKET 1 (2005). The study matched teams of young men of different races but with similar verbal skills, interactional styles, and physical appearance, provided them with identical training and virtually identical fictitious resumes, and sent them out to apply for 1,470 real entry-level jobs in New York City. *Id.*

The results were startling: white applicants with virtually identical qualifications received a

positive response rate almost twice that of black applicants with the same qualifications. *Id.* at 2. Hispanics were slightly less likely than whites to receive a positive response. *Id.* White applicants with otherwise equal qualifications but who admitted to a prior felony conviction as part of the application process were still more likely to receive a positive response to their application than similarly qualified black applicants who had *no* prior felony conviction.

While white applicants with felony convictions were substantially less likely to receive a positive response than white applicants with no prior criminal record, Hispanic applicants with no felony conviction scored only slightly higher than white applicants who admitted to a criminal record. These results led the authors of the study to conclude that "race appears to overtake all else in determining employment opportunities." *Id.*

But for the study, the job interactions would likely have appeared normal to the applicants. In one example, three testers with equal qualifications applied for the same position. The black and Hispanic testers were told that the position had been filled. The white tester, who applied after the other two, was instead hired on the spot. "Incidents such as these illustrate the ease with which contemporary acts of discrimination can remain completely undetected." *Id.*

The same is true, research shows, with respect to linguistic profiling that can occur over the telephone. "It is clear that speakers of nonstandard

dialects face significant disadvantages in the job market." Dawn L. Smalls, *Linguistic Profiling and the Law*, 15 STAN. L. & POL'Y REV. 579, 580 n.9 (2004). Individuals have been discriminated against because they did not sound "black enough," because they sounded "too black," and because they "did not sound white enough." *Id.* at 604 (collecting cases and materials). One study determined that listeners "correctly identified [among white, black and Hispanic] dialects more than 70 percent of the time." Thomas Purcell, William Idsardi & John Baugh, *Conceptual and Phonetic Experiments on American English Dialect Identification*, 18 J. OF LANG. AND SOC. POL'Y 10, 22 (Mar. 1999). The study concluded that "[d]iscrimination induced by speech characteristics does take place." *Id.* at 28.

Even absent the display of *any* physical or linguistic characteristics, discrimination occurs when employers assign racial characteristics to an applicant based solely on the applicant's name. In one study, testers created resumes and assigned "very White sounding names (such as Emily Walsh or Greg Baker)" to half of the resumes, and "very African American sounding names (such as Lakisha Washington or Jamal Jones)" to the other half. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, AM. ECON. REV. 991, 992 (Sept. 2004).

Testers sent resumes to over 1300 employment ads in Chicago and Boston newspapers. *Id.* The resumes documented either a high quality

applicant or a lower quality of applicant, and testers typically sent one of each for the applicants with white-sounding names, and one of each for applicants with black sounding names to each position applied for. The study found "large racial differences in callback rates." Applicants with white sounding names had to send out ten resumes to get one callback, whereas applicants with African American sounding names had to send out approximately fifteen resumes to get one callback. *Id.* The gap between applicants with highly qualified resumes was even more strongly tilted in favor of applicants with white-sounding names. *Id.* at 993.

Even though these practices may result from intentional discrimination, they are difficult to detect and, often, first come to light because of racially disparate outcomes. *See e.g.*, *Parham v. S.W. Bell Tel. Co.*, 433 F.2d 421, 425-26 (8th Cir. 1970) ("In cases concerning racial discrimination, statistics often tell much and Courts listen." (quoting *Alabama v. United States*, 304 F.2d 583, 587 (5th Cir.), *aff'd per curiam*, 371 U.S. 37, 83 (1962))); *Roberts v. Texaco*, 979 F. Supp. 185 (S.D.N.Y. 1997); Brent Wade, *Fueled By Bigotry, Book Review*, WASH. POST, June 14, 1998, at X07 (recounting the details of the *Roberts v. Texaco* case of racial discrimination in hiring and promotion practices and discovery of covert racism among senior corporate executives). Preserving the latitude of public and private institutions to act upon such evidence—including by suspending decisionmaking and investigating alternatives—is crucial to the protection of equal opportunity for all.

2. *Institutional or Systemic Bias.* Systemic bias occurs when a process or procedure within an institution perpetuates unequal opportunity or is crafted to the skills or needs of one group, but not others. *See Teamsters*, 431 U.S. at 349.

Present-day procedures and policies may be based on prior discriminatory assumptions or practices that are resistant to change and thus employees who are merely executing "the rules" may be perpetuating discriminatory practices. *See, e.g., Griggs*, 401 U.S. at 430 (noting that selection procedures based on intelligence tests and high school graduation requirements perpetuated racial discrimination because blacks had "long received inferior education in segregated schools"); *Teamsters*, 431 U.S. at 349 ("[T]ests neutral on their face, or even neutral in [their] intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices" and "perpetuates the effects of prior discrimination" quoting *Griggs*, 401 U.S. at 430)); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 731 (2003) ("[D]ifferential [family and medical] leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work."); *see generally* Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (June 2000).

In *Teamsters,* the Court described the circumstances in *Asbestos Workers Local 53 v.*

Vogler, 407 F. 2d 1047 (5th Cir. 1969), in which a challenged practice perpetuated the effects of prior discrimination:

> There a union had a policy of excluding persons not related to present members by blood or marriage. When in 1966 suit was brought to challenge this policy, all of the union's members were white, largely as a result of pre-Act, intentional racial discrimination. The court observed: While the nepotism requirement is applicable to black and white alike and is not on its face discriminatory, in a completely white union the present effect of its continued application is to forever deny to negroes and Mexican-Americans any real opportunity for membership.

Teamsters, 431 U.S. at 349 n.32 (quoting *Vogler*, 407 F. 2d at 1054) (internal quotation marks omitted).

Particularly for large public employers—and historically demonstrated in the case of firefighters and other public services—the discriminatory effect of nepotism, word-of-mouth recruiting, or other practices susceptible to institutional bias may initially come to light only through racial imbalances in the workforce. *See, e.g.*, *Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 521 (6th Cir. 2001) (district court erred when it entered summary judgment on behalf of city that engaged primarily in word-of-mouth advertising of municipal police, firefighter, and other positions); *see also Thomas v.*

Wash. County Sch. Bd., 915 F.2d 922, 925 (4th Cir. 1990) (district court erred when it ignored evidence of racial disparities of the work force that was in part due to word-of-mouth hiring procedures); *Nelson v. Wal-Mart Stores, Inc.*, 245 F.R.D. 358, 366-67 (E.D. Ark. 2007) ("[T]he nature of word-of-mouth recruiting is to prevent members of a protected class from even knowing about employment opportunities.")

One study described in detail the impact of "word of mouth" recruiting of grand jurors in Los Angeles County, California extending back to the 1960s and continuing to contemporary times. *See* Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination, supra.* The judges of the Los Angeles Superior Court selected grand jurors, and typically did so from among friends, neighbors, and social acquaintances. *Id.* at 1736-37. Mexican Americans were almost never a part of the judges' social circles, and represented just slightly more than one percent of grand jurors seated from 1959 to 1969, even though they constituted more than 18% of the total population. *Id.* at 1742.

Although the judges did not appear to have acted with discriminatory intent, the effect of the "pick a friend" selection process was to exclude Mexican Americans almost entirely from grand juries. *Id.* at 1722, 1739-40. In short, the judges, who apparently had no overt intent to discriminate, engaged in a process that had a discriminatory and harmful effect, and that process became institutionalized.

In some instances, an institution itself may serve as an "amplifier" for the overt, covert, or implicit biases of those who staff its operation, particularly where the institution is premised on discretionary, subjective decisionmaking. This effect has been documented in a recent paired testing study of financial institutions that revealed disparate impact due to structural flaws in the mortgage lending industry's procedures. Office of Policy Dev. and Research, U.S. Dep't of Housing and Urban Dev., *All Other Things Being Equal: A Paired Testing Study of Mortgage Lending Institutions* (Apr. 2002). The study paired two testers—one white and one minority—who posed as first time homebuyers with virtually indistinguishable credit portfolios. *Id.* at 1.

African-American and Hispanic homebuyers received less favorable treatment than comparable whites when they visited mortgage lending institutions to inquire about financing options, including being offered lower loan amounts, being denied basic information about loan amounts and house pricing, being told about fewer loan products, being offered less coaching, and receiving less follow up. *Id.*

The source of this institutional bias is difficult to determine. Although it could have been the result of personal bias on the part of various loan officers, approximately one half of the test pairs met with different loan officers within the same mortgage lending institution. *Id.* at 23. Test results were "stratified by whether testers saw the same loan officer or different loan officers" and "the patterns of

differential treatment remained essentially the same." *Id.* This suggests that the institutional bias resulted from something other than individual loan officers' bias amplified to the institutional level.

The identification and investigation of disparate outcomes in other contexts, such as the juvenile justice system and the administration of federal agricultural assistance, has led to effective institutional reform. An initial investigation by the National Coalition of State Juvenile Justice Advisory Groups (now the Coalition for Juvenile Justice) in 1988 led to the 1988 Amendments to the Juvenile Justice and Delinquency Prevention Act of 1974 requiring states to address "disproportionate minority contact" in their state plans for participation in the Formula Grants Program.[5] In 1991, minority youth were 32 percent of the juvenile population nationwide but represented 65% of the juveniles detained, an increase from 53% of juveniles detained in 1983 despite no change in the minority proportion of the national juvenile population. *Disproportionate Minority Confinement 2002 Update* at 1 (internal citation omitted).

Recognizing disparate effects of state policy relating to contact and confinement of minors, the Department of Justice commissioned a comprehensive analysis of twenty years of juvenile justice system research literature. It found that

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[5] Office of Juvenile Justice and Delinquency Prevention, *Disproportionate Minority Confinement 2002 Update iii* (Sept. 2004) [hereinafter *Disproportionate Minority Confinement 2002 Update*].

"approximately two-thirds of the reviewed research indicated that a youth's racial status made a difference at selected stages of juvenile processing. . . independent of the type of research design employed." Pope et al., DISPROPORTIONATE MINORITY CONFINEMENT: A REVIEW OF THE RESEARCH LITERATURE FROM 1989 THROUGH 2001, at 2 (2002).

The Department of Justice has since concluded that "[t]here is substantial evidence that minority youth are often treated differently from majority youth within the juvenile justice system." Office of Juvenile Justice and Delinquency Prevention, *Minorities in the Juvenile Justice System* 3 (Dec. 1999). Whether the disparities in contact and confinement occur because individual officials who administer the system are biased, or due to some other more fundamental systemic flaw, the result is that discrimination is embedded in the institutional structure of the governmental organization.

Institutional bias of this sort necessarily requires proactive institutional action to reestablish freedom from discrimination. In the case of disparate treatment of minorities within the juvenile justice system, appropriate statistical and social science analysis led to further voluntary, systemic reform in the Office of Juvenile Justice and Delinquency Prevention, as well as elevation of disproportionate minority contact as a concern in support to states. By acknowledging disparate effects of policy and acting upon best research and statistics, the Department of Justice reduced, between 1990-91 and 1996-97, the disparity between

white and black juvenile proportions in all but two stages of the juvenile justice system. *Disproportionate Minority Confinement 2002 Update* at 3.

Another example of institutional bias identified through governmental response to disparate results involves discrimination against African-American farmers by the U.S. Department of Agriculture. A 1990 congressional report found, among other things, that black-owned farms were going out of business at a rate three times that of white farms. 136 Cong. Rec. S10727-03 (daily ed. July 26, 1990) (Statement of Sen. Fowler). The report helped to elevate decades of previously-ignored complaints by African-American farmers around the country, catalyzing a process that ultimately identified gross discrimination by agency officials and led to a negotiated remedial system. *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999); Cassandra Jones Havard, *African-American Farmers and Fair Lending: Racializing Rural Economic Space*, 12 STAN. L. & POL'Y REV. 333 (2001).

In December of 1996, for example, the Secretary of Agriculture appointed a Civil Rights Action Team to "take a hard look at the issues and make strong recommendations for change." *Pigford*, 185 F.R.D. at 88. In 1997, the Action Team concluded that "minority farmers have lost significant amounts of land and potential farm income as a result of discrimination by [Farm Services Agency] programs. . . ." *Id.* The same year, the Office of the Inspector General of the USDA issued a report stating that the agency had "a

backlog of complaints of discrimination that had never been processed, investigated [or] resolved." *Id.* Subsequent litigation and advocacy led to congressional action, a consent decree, and a detailed remedial system for farmers aggrieved by USDA lending and related discrimination. *See generally Pigford,* 185 F.R.D. 82.

The black farmers' decades-long odyssey powerfully illustrates why public entities must have the power to investigate and respond to statistical evidence of discrimination, including by suspending questionable selection processes in order to explore less discriminatory approaches. Under petitioners' flawed interpretation of the law, doing so is itself unlawful discrimination. Precedent, research, and experience make clear, however, that reassessing procedures based on emerging evidence is core to ensuring equal opportunity. This is especially true in the case of governmental actors, who are typically responsible for the diffuse decisionmaking of multiple departments, systems and individuals.

3. *Implicit Bias.* Overwhelming social science research indicates that subconscious or "implicit" bias, particularly against people of color, remains a significant obstacle to equal opportunity. *See, e.g.*, Kristin A. Lane et al., *Implicit Social Cognition and the Law*, 3 ANN. REV. L. & SOC. SCI. 427 (2007).

These implicit biases grow out of the human organism's need to categorize and sort a vast amount of information every day. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489-1593 (2005) (citing multiple social science studies in support). Humans

"simplify the datastream at every stage of information processing through the use of" categorization. *Id.* at 1499. The resultant categories rely on oversimplifications, generalizations, associations, and stereotypes, including racial stereotypes, to process quickly incoming information. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188 (1995).

At one level, they are adaptive and unavoidable. "If our species were 'programmed' to refrain from drawing inferences or taking action until we had complete, situation specific data about each person or object we encountered, we would have died out long ago." *Id.* But when they come into play in the context of employment decisionmaking, they threaten unlawfully to deny equal opportunity in ways that are not visible or evident without probing and investigation.

When it comes to race and ethnicity, moreover, these are not "equal opportunity" impulses. Rather, studies have shown that humans often rely on generalizations tied to socially-constructed stereotypical beliefs rather than on generalizations more consistent with reality. David L. Hamilton & Terrence L. Rose, *Illusory Correlation and the Maintenance of Stereotypic Beliefs*, 39 J. OF PERSONALITY & SOC. PSYCHOL. 832, 832 (1980); *cf. Hibbs*, 538 U.S. at 729-30 (summarizing the history of state laws limiting women's equal employment opportunities relying on stereotypes of women as

necessarily restricted by requirements of reproduction).

This is not to say that racial bias in hiring or promotions is inevitable. Rather, because implicit biases are ubiquitous and frequently invisible even to the perpetrator, preventing them from infecting employment decisions requires vigilance and proactivity in response to, among other things, disparate outcomes. Over the last decade, the existence of implicit bias has been documented extensively, as exemplified through application of the Implicit Association Test ("IAT").[6] Racially focused IATs pair pictures of human faces of different races or ethnicities with words that have a generally positive connotation, words that have a generally negative connotation, and words that are associated with specific racial categorizations. Kang, *Trojan Horses of Race*, at 1510.

The test is iterative, with test takers being asked to respond to combinations of images and words by striking a particular key on a computer keyboard. The combinations change from iteration to iteration. For example, in one iteration the test might require a response when African-American faces are paired with negative words and white faces are paired with positive words, or vice versa.

If a test taker must overcome a stereotype—or an implicit bias—it will take the test taker longer to strike the required key. Thus the test has found, for

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[6] A version of the Project Implicit IAT can be taken here: https://implicit.harvard.edu/implicit/research/.

example, that test takers who had an implicit pro-white bias had faster response times when the word "success" was paired with a white face. In tests taken from 2000 to 2006, the study found that three-quarters of whites have an implicit pro-white/anti-black bias, and blacks split evenly between pro-black and pro-white biases. According to the Director of Project Implicit, "our brains automatically make associations based on our experiences and the information we receive, whether we consciously agree with those associations or not." Charles M. Blow, *A Nation of Cowards?* N.Y. TIMES, Feb 21, 2009, at A21. *See also* Anthony G. Greenwald *et al.*, *Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm*, 85 J. PERSONALITY & SOC. PSYCHOL. 197 (2003).

Such automatic negative associations may lead to discrimination in contradiction to our national policy of equal opportunity. Renowned social psychologist Alexander Green has demonstrated the real-world impact of racial bias in the provision of health care. Alexander R. Green et al., *Implicit Bias among Physicians and its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERN. MED. 1231 (2007). In the study, physicians were found to have implicitly stereotyped African-American patients as less cooperative, and were less likely to treat them with life-saving drugs. The study used the physicians' self-report regarding racial prejudice, IATs to assess implicit bias, and vignette tests to see how the physicians would perform in real life situations. *Id.* The vignettes described male patients, some white and some black, with identical

signs and symptoms of possible myocardial infarction. *Id.*

Doctors who self-reported no explicit preference for white patients over black patients actually did implicitly prefer white patients. *Id.* at 1233-35. Similarly, doctors who self-reported no difference in cooperativeness of white patients versus black patients in fact had an implicit stereotype of black patients as less cooperative. Furthermore, the greater a doctor's bias for white patients as measured by the test, the more likely they were to treat white patients, and the less likely they were to treat black patients, with life-saving thrombolytic drugs. *Id.* at 1235. The study thus linked the doctors' implicit biases with discriminatory—and life-threatening—outcomes in healthcare treatment.

Implicit biases do not operate outside the legal framework for identifying discrimination. This Court noted in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), that "subconscious stereotypes and prejudice" remained "a lingering form of the problem that Title VII was enacted to combat," *id.* at 982, and that such biases have "precisely the same effects as a system pervaded by impermissible intentional discrimination," *id.* at 990.

Contemporary forms of intentional and unintentional bias continue to deny equal opportunity in a number of sectors, including employment. The Title VII framework provides for employers to respond when the presence of disparate outcomes suggests the possibility of underlying

biases that may infect the organization's procedures. By investigating the discrepancies, and identifying whether the organization's procedures serve legitimate business needs and whether less discriminatory alternatives are available, employers further the statutory and constitutional goals of assuring equal opportunity. This Court should preserve and enhance employers' ability forthrightly to do so.

C. International Consensus Supports the Legality of Voluntarily Attending to the Discriminatory Results of Facially Neutral Practices

Interpreting Title VII in this manner is also consistent with international law. While the task of interpreting domestic law is the purview and responsibility of U.S. courts, this Court has recognized the value of international authority as "instructive for its interpretation" of federal law. *Roper v. Simmons*, 543 U.S. 551, 575-76 (2005); *see also Grutter v. Bollinger*, 539 U.S. 306, 342-43 (2003) (Ginsburg, J., concurring) (noting as instructive the international understanding for and limits to proactive government actions as embodied in the international Convention on the Elimination of All Forms of Racial Discrimination); *Lawrence v. Texas,* 539 U.S. 558, 573 (2003) (Kennedy, J.).

The International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), a treaty which the United States has

signed and ratified,[7] is instructive in resolving the case at bar.[8] As of March 19, 2009, 173 nations had become parties to CERD, representing a broad inter-governmental consensus regarding "measures for speedily eliminating racial discrimination in all its forms and manifestations . . . ." CERD, pmbl.

Like Title VII, CERD specifically requires that governments eliminate behavior that is unnecessarily discriminatory *in effect*. CERD, art. 1(a) ("[R]acial discrimination" is "any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the *purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." (emphasis added)).

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[7] CERD, 660 U.N.T.S. 195, was originally signed September 28, 1966, entered into force January 4, 1969 and ratified by Congress on October 24, 1994. *See* 140 Cong. Rec. S7634.

[8] Where possible, the Court should interpret Title VII in consonance with CERD and other international laws, because "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). For the reasons described elsewhere in this brief, however, the Court need not reach this question in order to resolve the case at bar. *Amicus* does not argue that enforcement of the treaty itself is directly implicated here.

In its General Recommendation no. 14 of 22 March 1993 on the definition of discrimination, the Committee on the Elimination of Racial Discrimination, the UN body responsible for administering the treaty, noted, *inter alia,* that "[i]n seeking to determine whether an action has an effect contrary to the Convention, [the Committee] will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin." U.N. Office of the High Comm'r for Human Rights, Comm. on the Elim. of all Forms of Racial Discrim., *General Rec. no. 14: Definition of Discrim.* ¶1, U.N. Doc. A/48/18 (Mar. 22, 1993).

CERD, moreover, calls for governments to take proactive steps to reexamine, change, or abandon policies having an unjustified discriminatory effect. Parties to the treaty, CERD provides, "shall take effective measures to review governmental, national, and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists." Art. 2(1)(c).

Interpreting Title VII to allow the kinds of voluntary compliance efforts at issue here would be consonant with CERD.

II. EFFORTS TO ASSURE SELECTION PRACTICES ARE NOT DISCRIMINATORY DO NOT TRIGGER STRICT SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE IN THE ABSENCE OF EVIDENCE THAT THEY ARE A PRETEXT FOR INTENTIONAL DISCRIMINATION

Since contemporary discrimination does not ordinarily announce itself overtly, employers must be on the lookout for other markers of unlawful discrimination. One marker is unequal outcomes, which may signal the presence of discrimination—whether covertly intentional, unintentionally implicit, or embedded in institutions. Because "[c]ooperation and voluntary compliance were selected as the preferred means for achieving this goal," *Alexander*, 415 U.S. at 44, employers act consistent with the statutory objective when they undertake such an investigation, and the Equal Protection Clause does not deprive employers of the leeway to promote equality of opportunity by examining and modifying selection procedures when evidence suggests valid alternate mechanisms can reduce the extent of the disparate outcomes.

A. Examining or Responding to Evidence that Discriminatory Outcomes are Avoidable, that Less Discriminatory Alternatives Exist, or that Selection Criteria are Valid does not Constitute Race-Based Decisionmaking

1. The Title VII framework allows—indeed requires[9]—employers faced with a process having a discriminatory effect to assess the fairness and validity of the *process* to assure that it is free of unjustified racial bias. This framework recognizes the reality that discriminatory effects may signal the presence of intentional, covert, structural, or implicit biases that, left unchecked, will frustrate equal employment opportunity.

Thus, where a promotional test has a discriminatory effect, Title VII requires the employer to assess whether the selection mechanism is job related and dictated by business necessity, and whether other less discriminatory alternatives are available. 42 U.S.C. § 2000-e2(k)(1)(A)(i). If an employer legitimately validates its promotional test, and is confident that no less discriminatory test is available, it may typically accept the results of that

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[9] Because this case addresses what public employers may voluntarily do to comply with Title VII, the Court need not address what, precisely, Title VII might require in the circumstances of this case.

test, whatever the racial composition of the finalists the test produces.[10]

The Title VII framework assures that the focus of such an inquiry, while triggered by unequal outcomes, is on the job relatedness and necessity of, and alternatives to, the procedures that led to those outcomes, rather than on the unequal outcomes themselves or the specific individuals ultimately selected. Since a principal focus of Title VII is to address discrimination and bias in its various and evolving forms, *see, e.g.*, *Teamsters*, 431 U.S. at 348-349, a focus on *procedures* that result in discriminatory outcomes is squarely within the proper scope of the statute.

Petitioner's contention that New Haven's action was "race-based," Pet. Br. 23-27, misapprehends the Title VII inquiry. Based on the information it received about the disparate impact of the administered test, the city investigated the mechanism by which that outcome was effectuated. Its action in correcting that mechanism was race-neutral—the test results went uncertified for all candidates. JA227.

Petitioners assume that the correction of a flawed *process* is necessarily oriented towards a

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[10] Note, however, that an employer is not *required* immediately to certify results under this scenario. Where a selection procedure has an extremely discriminatory impact that appears difficult to explain, the employer may be wise and justified to extend the search for less discriminatory alternatives.

particular racial outcome. Pet. Br. 25-26. Critically, Title VII does not mandate the ultimate racial composition of the workforce; where there is a discriminatory effect, it requires employers to scrutinize their procedures. In the end, *any* racial composition of a workforce is acceptable under Title VII, so long as the process is free of unjustified racial bias. *See Teal*, 457 U.S. 440. This Court has explained that racial balance is neither the goal of Title VII, nor a defense to a Title VII violation, which focuses on the validity of the underlying procedure.

Accordingly, in the instant case, once New Haven adopts a validated process tied to business necessity that is the least discriminatory one available,[11] it may promote the successful candidates under that process, irrespective of whether the same candidates are promoted with the same racial composition as under the prior, legally questionable examination.

2. Title VII's focus on the fairness and legality of the selection process is in contrast to cases in which this Court has found that governmental use of explicit racial classifications in an attempt to craft a particular racial outcome—target levels of racial diversity in contracting, university admissions, or school composition—warranted strict scrutiny. *See,*

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[11] Here, the exam in question was being administered for the first time. Accordingly, real world outcomes under the exam necessarily became part of the validation process. This will not be the case, however, when, in the future, New Haven administers a validated, lawful exam.

e.g., *Croson*, 488 U.S. 469; *Grutter*, 539 U.S. 306; *Parents Involved*, 127 S. Ct. 2738.

A majority of this Court rejected in *Parents Involved* the notion that governmental motivation to address racial segregation or exclusion—whether *de facto* or *de jure*—alone constitutes racial animus triggering strict scrutiny. 127 S. Ct. 2738; *see also Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality opinion) ("[S]trict scrutiny does not apply merely because redistricting is performed with consciousness of race.").

If the Court were to rule that any efforts to attend to the racial impact of decisionmaking criteria constitutes a racial classification triggering strict scrutiny under the Equal Protection Clause, it would seriously hobble efforts to identify and redress procedures that reflect or contain intentional or unintentional racial bias. Imagine, for example, that a city commission consistently awards public contracts only to white contractors despite clear evidence that many equally qualified minority contractors exist and have bid for city contracts. The City Council suspects that commissioners are engaging in *intentional* discrimination, and suspends all contract approvals until a full investigation can be completed, and alternative procedures explored.

Under the theory advanced by petitioners, each of the following would warrant strict scrutiny: (1) attending to the discrepancy between the racial composition of those selected and the city-wide pool of qualified candidates to determine if there is unwarranted discrimination; (2) suspending the

contracting process pending further investigation; (3) exploring the possibility of intentional or unintentional bias; and (4) determining whether a valid alternative procedure can avoid or mitigate the inequality of opportunity perpetrated by the existing procedure.

In addition to thwarting enforcement of a wide range of established equal opportunity laws and penalizing voluntary compliance efforts, that analysis is contrary to the Court's anti-discrimination jurisprudence. As discussed above, a long line of Equal Protection Cases, from *Yick Wo* to *Washington v. Davis* to *Village of Arlington Heights* to *Batson* to *Parents Involved* makes clear that attending to the racial impact of governmental decisions, exploring their causes, and avoiding unnecessary bias are part and parcel of ensuring freedom from discrimination—and are "race neutral" for purposes of constitutional scrutiny.

B. Where Title VII Compliance is a Pretext for Discriminatory Intent, Both the Enforcement Mechanisms of Title VII and the Equal Protection Clause are Triggered

Of course, employers may not hide behind Title VII compliance when their real motive is not assuring an appropriate selection process, but rather achieving a particular racial outcome. In such an instance, the ostensible compliance efforts would be a pretext for unlawful racial animus as well as a

violation of Title VII and, in the case of public employers, the Equal Protection Clause.

The prospect that an employer might subvert the appropriate equal opportunity goals and mechanisms of Title VII as a pretext for unlawful racial animus may be addressed by the courts through established Title VII analysis relating to discriminatory intent. *See McDonnell Douglas*, 411 U.S. at 804 (a plaintiff may demonstrate an employer's stated non-discriminatory justification is in fact pretext for intentional discrimination).

And where action taken by a public employer in purported compliance with Title VII is in fact pretext for intentional discrimination, evidence of discriminatory intent triggers strict scrutiny under the Equal Protection Clause. *Washington*, 426 U.S. at 242.

The record in the present case, viewed in the light most favorable to petitioners, does not present a question of material fact regarding the existence of pretext. To the contrary, the record shows that the city was properly focused on ensuring a fair selection process, as reflected by the transparency of its public and participatory four-day hearing process; the evidence-based nature of its inquiry into the operation of the selection criteria and the availability of less discriminatory alternatives; its focus on compliance with civil rights laws; and the demonstrable flaws in the testing process at issue. JA22-169; Resp. Br. 6-11. By contrast, there is no evidence to conclude that the city's true motive was

to manufacture a preordained racial result irrespective of the validity of the selection process.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

ANKUR J. GOEL
Counsel of Record
KELLY M. FALLS
AMY H. GRANGER
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 756-8000

ALAN JENKINS
JUHU THUKRAL
KEVIN S. HSU
THE OPPORTUNITY AGENDA
568 Broadway, Suite 302
New York, NY 10012
(212) 334-5977

Counsel for Amicus Curiae

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